

ms. Golden

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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

[Reconsideration of Decision Involving District of Columbia Contract]

FILE: B-196914

DATE: October 14, 1980

MATTER OF: Biospherics, Inc. -- Reconsideration

DIGEST:

Decision is affirmed upon reconsideration where protester has failed to show that decision was as matter of law incorrect in holding that descriptive literature may be required only in connection with products and not services since applicable regulations and GAO decisions are clear on this point.

Biospherics, Inc., the awardee of the contract under invitation for bids (IFB) No. 0060-AA-66-1-0-BM for onsite laboratory services for wastewater treatment for the District of Columbia (DC) requests reconsideration of our decision, Lapteff Associates, Martel Laboratories, Inc., Kappe Associates, Inc., B-196914, B-196914.2, B-197414, August 20, 1980, 80-2 CPD 135. In that decision, we concluded that the solicitation was defective and the three low bids were improperly rejected as nonresponsive. We recommended that the contract award for 1 year not be disturbed, but recommended that the options for additional years of performance not be exercised and that the procurement be solicited on a proper basis.]

Clause 28 of the IFB required that bidders submit a detailed outline and narrative indicating how they proposed to comply with required quality control and quality assurance requirements. The IFB clause also provided a bidder could be found nonresponsive for failure to comply with the requirement. The three low bids were rejected for failing to satisfactorily comply with the requirements of clause 28.

We determined that the solicitation was defective because the DC procurement procedures' descriptive literature requirement did not apply to services, but instead was limited by language and purpose to products. We also referred to the descriptive literature provision

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of the Federal Procurement Regulations § 1-2.202-5 (1964 ed. amend. 13). Further, we noted that our review of the case law cited by Biospherics did not provide support for the view that the term descriptive literature or descriptive data had been applied to information concerning how a bidder proposes to perform services, even of a technical nature such as laboratory services.

[We stated that we knew of no regulation or decision of our Office which permits a contracting agency to determine bid responsiveness by requiring bidders to furnish with their bids a description of how they propose to perform the contract. We characterized such information as bearing on bidder responsibility, the proposed method of performance, not bid responsiveness which concerns whether the bidder has offered to do what is required by the solicitation. We concluded that a contracting agency cannot make a matter of responsibility into a question of responsiveness by the terms of the solicitation.]

[Biospherics asserts] our decision is wrong as a matter of law. It states that the regulations and our decisions do not limit the use of a descriptive literature clause for the procurement of supplies and that only by happenstance have we never had a decision applying descriptive literature to services. In fact, Biospherics contends that our position is inconsistent with regulation and in support thereof quotes the following footnoted instruction to contracting officers in connection with the descriptive literature clause included in FPR § 1-2.202-5(d)(1):

"Contracting officer shall insert significant elements such as design, materials, components, or performance characteristics, or methods of manufacture, construction, assembly, or operation, as appropriate."

Since the instruction contemplates obtaining information relating to "methods of performance," Biospherics contends that the bids were properly rejected for failure to include the prescribed data relating to the method of

performance.) Biospherics also supports its position that the use of a descriptive literature requirement was proper in these circumstances, arguing, by analogy, that the Changes clause of standard form 32, which, by its language, applies only to supplies, has been extended by cited Boards of Contract Appeals (BCA) cases to services.

(Our bid protest procedures require that a request for reconsideration must specify any errors of law made or information not previously considered.) 4 C.F.R. § 20.9(a) (1980). (We do not believe Biospherics has met this requirement.)

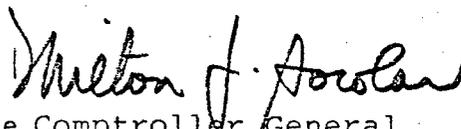
In our decision, we reviewed the purpose and language of DC's descriptive literature provision and the FPR's and concluded that by definition and purpose descriptive literature refers to information which describes products and explains their operations. We concluded that the quality control and quality assurances requirements of the subject solicitation were not that type of information within the meaning of the DC procurement procedures.

Under the DC procurement procedures, the term "descriptive literature" is defined to mean information, such as drawings and brochures, which shows the characteristics or construction of a product or explains its operation. Further, under the applicable provision, the term descriptive literature is explicitly defined to include only information required to determine acceptability of the product and explicitly excludes other information such as that furnished in connection with the qualifications of a bidder or used in operating or maintaining equipment. (It is clear, therefore, contrary to Biospherics' contention, that our decision correctly stated that the bids of the three protesters were improperly rejected as nonresponsive pursuant to a requirement explicitly prohibited by regulations. It is also clear that the lack of any decisions of our Office applying descriptive literature requirements to services results not from happenstance, but from a proper application of the regulations.) See Hub Testing Laboratories, B-199368, September 18, 1980, 80-2 CPD _____, which applied the rationale of our decision in this case to a recent procurement.

Whether the descriptive literature requirement may logically be applied to services, as Biospherics contends, need not be considered in view of the clear regulatory prohibition and Biospherics' failure to demonstrate any error of law in our prior decision in this regard. We also believe the analogy to the situation here which Biospherics attempts to draw from BCA cases is irrelevant since those cases involved the interpretation of a contract clause, whereas we are concerned with a regulatory requirement applicable to the formation of a contract.

As a final matter, Biospherics requests a conference because of the importance of the case. Our bid protest procedures do not explicitly provide for conferences in connection with reconsiderations. 4 C.F.R. § 20.9 (1980). We believe a request for a conference should be granted only where the matter cannot be resolved without a conference. In light of the previous discussion, we do not believe this is such a case. Serv-Air, Inc.--
Reconsideration, B-189884, March 29, 1979, 79-1 CPD 212.

[Since Biospherics has not presented evidence demonstrating any error of fact or law in the original decision nor provided any substantive information not previously considered, our decision is affirmed.]



For The Comptroller General
of the United States